MONTANA LEGISLATIVE HISTORY

Chapter 23 1993

Bill H _____ S 250 Original bill & history ~ C

H. Committee on Ed & Cultural Resources		S. Committee on Judiciary	
Hearing Date(s) _____	C	Hearing Date(s) _____	C
3/3 ✓	C	2/9 ✓	C
_____	C	_____	C
_____	C	_____	C
Date Out 3/3 ✓	C	2/16 ✓	

Did this bill originate in an interim committee? ____Yes ~~____~~No

Committee _____ Report _____

SENATE BILL NO. 250

INTRODUCED BY YELLOWTAIL
BY REQUEST OF THE SENATE JUDICIARY COMMITTEE

IN THE SENATE

JANUARY 25, 1993	INTRODUCED AND REFERRED TO COMMITTEE ON JUDICIARY.
	FIRST READING.
FEBRUARY 16, 1993	COMMITTEE RECOMMEND BILL DO PASS AS AMENDED. REPORT ADOPTED.
FEBRUARY 17, 1993	PRINTING REPORT.
FEBRUARY 18, 1993	ON MOTION, CONSIDERATION PASSED FOR THE DAY.
FEBRUARY 20, 1993	SECOND READING, DO PASS.
FEBRUARY 22, 1993	ENGROSSING REPORT.
	THIRD READING, PASSED. AYES, 46; NOES, 2.
	TRANSMITTED TO HOUSE.

IN THE HOUSE

FEBRUARY 23, 1993	INTRODUCED AND REFERRED TO COMMITTEE ON EDUCATION & CULTURAL RESOURCES.
	FIRST READING.
MARCH 4, 1993	COMMITTEE RECOMMEND BILL BE CONCURRED IN. REPORT ADOPTED.
MARCH 6, 1993	SECOND READING, CONCURRED IN.
MARCH 9, 1993	THIRD READING, CONCURRED IN. AYES, 65; NOES, 32.
MARCH 10, 1993	RETURNED TO SENATE.

IN THE SENATE

MARCH 11, 1993	RECEIVED FROM HOUSE.
	SENT TO ENROLLING.

Senate BILL NO. 250

INTRODUCED BY [illegible]

BY REQUEST OF THE SENATE JUDICIARY COMMITTEE

A BILL FOR AN ACT ENTITLED: "AN ACT CONFORMING THE OPEN MEETING LAW TO THE INTERPRETATION OF THE PUBLIC PARTICIPATION AND RIGHT TO KNOW PROVISIONS OF THE MONTANA CONSTITUTION BY REMOVING CERTAIN EXCEPTIONS; AND AMENDING SECTION 2-3-203, MCA."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 2-3-203, MCA, is amended to read:

"**2-3-203. Meetings of public agencies and certain associations of public agencies to be open to public -- ~~exceptions~~** exception. (1) All meetings of public or governmental bodies, boards, bureaus, commissions, agencies of the state, or any political subdivision of the state or organizations or agencies supported in whole or in part by public funds or expending public funds must be open to the public.

(2) All meetings of associations that are composed of public or governmental bodies referred to in subsection (1) and that regulate the rights, duties, or privileges of any individual must be open to the public.

(3) Provided, however, the presiding officer of any meeting may close the meeting during the time the discussion relates to a matter of individual privacy and then if and only if the presiding officer determines that the demands of individual privacy clearly exceed the merits of public disclosure. The right of individual privacy may be waived by the individual about whom the discussion pertains and, in that event, the meeting ~~shall~~ must be open.

~~(4) However, a meeting may be closed to discuss a strategy to be followed with respect to collective bargaining or litigation when an open meeting would have a detrimental effect on the bargaining or litigating position of the public agency.~~

~~(5)~~ Any committee or subcommittee appointed by a public body or an association described in subsection (2) for the purpose of conducting business which is within the jurisdiction of that agency ~~shall be~~ is subject to the requirements of this section."

-End-

MINUTES

MONTANA SENATE
53rd LEGISLATURE - REGULAR SESSION

COMMITTEE ON JUDICIARY

Call to Order: By Senator Bill Yellowtail, on February 9, 1993, at 10:06 a.m.

ROLL CALL

Members Present:

Sen. Bill Yellowtail, Chair (D)
Sen. Steve Doherty, Vice Chair (D)
Sen. Sue Bartlett (D)
Sen. Chet Blaylock (D)
Sen. Bob Brown (R)
Sen. Bruce Crippen (R)
Sen. Eve Franklin (D)
Sen. Lorents Grosfield (R)
Sen. Mike Halligan (D)
Sen. John Harp (R)
Sen. David Rye (R)
Sen. Tom Towe (D)

Members Excused: NONE

Members Absent: NONE

Staff Present: Valencia Lane, Legislative Council
Rebecca Court, Committee Secretary

Please Note: These are summary minutes. Testimony and discussion are paraphrased and condensed.

Committee Business Summary:

Hearing:	SB 249
	SB 250
	SB 259
Executive Action:	SB 258
	SB 259
	SB 249
	SB 224
	SB 264

HEARING ON SB 249

Opening Statement by Sponsor:
Senator Yellowtail, District 50, told the Committee that SB 249 would bring Montana Statutes in conformance with the law of the land as expressed by the courts.

Proponents' Testimony:
Greg Petesch, Code Commissioner, said SB 249 provides that to the extent provided by federal law, telemetry devices shall be required. Mr. Petesch said SB 249 was drafted in response to concerns from the Committee concerning the federal preemption issues in the event the federal government ever allows such devices to be required. There is currently legislation before congress that would require telemetry devices in certain instances. SB 249 would conform the statute with the provision of PSC where the requirement of telemetry devices was found to be in conflict with federal law.

David Ditzel, Brotherhood of Locomotive Engineers, urged support for SB 249.

Francis Marceau, United Transportation Union, supports SB 249 because it would allow the law to remain on the books.

Russ Ritter, Montana Rail Link, supports SB 249.

Opponents' Testimony:
NONE

Questions From Committee Members and Responses:
Senator Towe asked Mr. Petesch about the deletion of the language on page 1, lines 11 through 22. Mr. Petesch said the language was archaic gender specific language that was being eliminated in order to conform with drafting directives by the legislative council.

Closing by Sponsor:
Chair Yellowtail said that by amending the statute to refer to the extent permitted by federal law, the door is left open for federal law to come back with some adjustment. Therefore, SB 249 is a flexible provision.

EXECUTIVE ACTION ON SB 249

Motion/Vote:
Senator Towe moved SB 249 DO PASS. The motion CARRIED UNANIMOUSLY.

HEARING ON SB 250

Opening Statement by Sponsor:
Chair Yellowtail, District 50, said SB 250 would conform Montana Statute to court law in regard to the Open Meetings Law.

Proponents' Testimony:
Greg Petesch, Code Commissioner, said SB 250 was drafted to address two court decisions. In one case, the Great Falls Tribune brought suit to eliminate the collective bargaining exemption for open meetings. The court struck down that provision. The other case was a litigation discussion decision. SB 250 goes beyond the exact holding of that case. The exact holding of that case held that litigation with strategy meetings had to be open where both parties were public entities. HB 250 as drafted, eliminates the litigation exemption to the open meeting requirement and retains only the constitutional exemption for individual privacy. Mr. Petesch told the Committee that several people contacted him to inquire if he would object to reinserting the litigation exemption. Mr. Petesch said he would have no objection to the reinsertion, but would leave that as a public policy matter to be determined by the Committee.

Charles Walk, Executive Director of the Montana Newspaper Association (MNA), representing 73 newspapers across Montana, said the MNA is in support of SB 250. The support is in keeping with MNA traditional support of legislation which improves, increases, and maintains the openness of Montana Government. The MNA supports SB 250 because it strengthens the peoples right to know what is going on in the governmental process. Mr. Walk asked the Committee to resist the amendment that would reinsert the litigation exemption.

Amy Kelley, Director of Common Cause/Montana, read from prepared testimony. (Exhibit #1)

John Kuglin, Montana Bureau Chief for The Associated Press, read from prepared testimony. (Exhibit #2) Mr. Kuglin submitted a 10 page brief on the Supreme Court decision in the Associated Press case. (Exhibit #3)

Chris Tweeten, Chief Deputy Attorney General for the State of Montana, submitted a proposed amendment. (Exhibit #4) Mr. Tweeten said the purpose of SB 250 is to conform the Montana Statutory Open Meeting Law to the interpretation of the statute handed down by the Montana Supreme Court. Mr. Tweeten explained the amendments.

Brett Dahl, Administrator of the Risk Management and Tort Defense Division, read from prepared testimony. (Exhibit #5)

Katherine Orr, Department of Health and Environmental Sciences, said they support SB 250 with the amendments provided by Mr. Tweeten.

Opponents' Testimony:
NONE

Questions From Committee Members and Responses:
Senator Rye asked Mr. Walk about the proposed amendments. Mr. Walk said he would oppose the amendments because they go beyond the scope of the Supreme Court ruling, but he feels there is room for discussion.

Senator Towe asked Rob Collins about his experience with the production of documents as a result of the Open Meeting Law. Rob Collins, Senior Council for the Natural Resource Damage Program (NRDP), said the NRDP is litigating the lawsuit the State has against ARCO for damages to the Clark Fork River Basin. Thus far, Montana has $4.9 million into the litigation in terms of expert witness fees, natural resource damage assessment, and ing general maintaining intense litigation. ARCO has constantly maintained that all of the NRDP work product and attorney documents should be turned over to them as soon as they are written. The NRDP has resisted, and as a result there is a motion pending in Great Falls Federal Court by ARCO to obtain all those documents. Mr. Collins said the NRDP has many defenses, one being that Montana law does not require the documents to be given to ARCO. Mr. Collins said it would be devastating if the NRDP would have to produce, for ARCO, all the documents that ARCO would not have to produce for the NRDP. Mr. Collins said a ruling was not expected in the Great Falls case because the parties had entered into settlement negotiations. A policy committee for the NRDP is made up of directors from the Department of Health, the Department of State Lands, the Department of Fish and Wildlife, and the Governor's policy director. The directors supervise the litigation. Mr. Collins said if ARCO was allowed to attend the meetings of the policy committee a lawsuit could not be maintained. Mr. Collins urged the Committee to adopt the amendment.

Senator Rye asked Mr. Kuglin about the proposed amendments. Mr. Kuglin said the Supreme Court said it was unconstitutional to close a meeting.

Senator Rye asked Mr. Kuglin if the decision in the Associated Press case would be reversed if SB 250 passed with the amendments. Mr. Kuglin said yes.

Senator Towe asked Mr. Walk about open meetings. Mr. Walk said if someone was a proponent of an open government and working in an open government atmosphere, there would be certain times when an open meeting would not be in their best interest. Open meetings are not there for the benefit of state employees or attorneys, but are for the benefit of the entire populous of Montana. Mr. Walk said open meetings may put the proponents at a disadvantage, but in the long run it would be an advantage to Montana.

Senator Doherty asked Mr. Petesch about the language, "the demands of individual privacy clearly exceed the merits of public disclosure." Mr. Petesch said the language is in the

constitution.

Senator Bartlett asked Mr. Tweeten if he would object to including wording in SB 250 to the effect that unless the meeting is to discuss litigation strategy involving two public agencies, the meeting would be open. Mr. Tweeten said it would not be necessary, but he would not object to the language.

Closing by Sponsor:
Senator Yellowtail said SB 250 is intended to conform the statute to the interpretation of the constitution and the Supreme Court, as it interprets the open meeting provision. Senator Yellowtail said he was concerned with the language which suggests that the open meetings law should not be interpreted as being solely for the purpose of benefiting state employees and their attorneys. Senator Yellowtail said the language suggests that state employees and attorneys operate as agents of the people in matters of public interest. Therefore, the Committee should consider that we need to protect the ability of the people's attorneys to conduct their strategy with some privacy. Senator Yellowtail said the amendment needs to be reconsidered to narrow it to apply strictly to the third party case.

HEARING ON SB 259

Opening Statement by Sponsor:
Senator Harp, District 4, said SB 259 was drafted in response to a decision by the Supreme Court in the case McTaggart vs. Montana Power Company. The Supreme Court held that when the relocation of a power line comes at the insistence of a landowner, the landowner should share the cost of relocation. SB 259 deletes the requirement that the utility company pay one half the cost for relocation; the landowner would pay the other half of the entire cost.

Proponents' Testimony:
Greg Petesch, Code Commissioner, told the Committee that the McTaggart vs. Montana Power Company case was decided in 1979. SB 259 would clarify that a utility having condemned the land, through eminent domain could not be required to pay the cost of exercising their easement a second time.

Opponents' Testimony:
NONE

Questions From Committee Members and Responses:
Senator Towe asked Mr. Petesch about the McTaggart case. Mr. Petesch explained the McTaggart case. The utility company had condemned a right of way for a power line across Mr. McTaggart's

Common Cause montana

P.O. Box 623
Helena, MT
59624
406/442-9251

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 1
DATE 2-9-93
BILL NO. SB250

COMMON CAUSE TESTIMONY
IN SUPPORT OF SB 250
FEBRUARY 9, 1993

Mister Chairman, members of the Senate Judiciary Committee, for the record my name is Amy Kelley, Executive Director of Common Cause/Montana. On behalf of our 800 members, I register our support for SB 250.

Common Cause/Montana has been active since 1971 in efforts to promote "good government" in Montana. Consequently, one of the organization's principal priorities has been to defend -- both before the Legislature and in the courts -- Montana citizens' right to know, and participate in, the workings of our government.

I am here today, however, not so much to defend our open meetings laws as to support a bill which, as we understand it, simply eliminates statutory language which has been deemed unconstitutional by the Montana State Supreme Court.

Montana statute provides that meetings of public or governmental bodies "may be closed to discuss a strategy to be followed with respect to collective bargaining or litigation." [2-3-203, MCA] The Montana Constitution, however, makes an open meeting exception only in cases where "the demand of individual privacy clearly exceeds the merits of public disclosure." [Article II, Section 9]

The Montana Supreme Court ruled, in *Great Falls Tribune v. District Court* (1980), that

> The language of [Article II, Section 9] speaks for itself. It applies to all persons and all public bodies of the state and its subdivisions **without exception**. Under such circumstances, it is our duty to interpret the intent of the framers from the language of the provision alone and not resort to extrinsic aids or rules of construction in determining the intent of the delegates to the Constitutional Convention.

Associated Press
John W. Kuglin
Chief of Bureau

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 2
DATE 2-9-93
BILL NO. SB250

February 9, 1993

Testimony in favor of Senate Bill 250.

I am John Kuglin, Montana bureau chief for The Associated Press.

I appear in favor of Senate Bill 250, introduced by Senator Yellowtail at the request of this committee.

My understanding is that this came from the code commissioner, to clean up the statutes as the result of two decisions by the Montana Supreme Court.

The first change is to strike language in the Open Meeting Law which allows a meeting to be closed to discuss collective bargaining.

This change is a result of the Montana Supreme Court's 6-1 decision in November, in what is commonly called the Tribune case. The court said it is unconstitutional to close meetings of public bodies and agencies to discuss collective bargaining strategy.

The second change is to strike language in this law which allows a meeting to be closed to discuss litigation strategy.

This change is a result of the Montana Supreme Court's unanimous decision in January 1990, commonly called The Associated Press case. The AP and 13 other plaintiffs challenged the state Board of Public Education for closing a meeting to discuss whether to sue the governor.

The Supreme Court in a narrow decision concluded that the board wrongfully closed its meeting to discuss potential litigation between two governmental entities, in violation of the state Constitution.

Senator Yellowtail's bill goes beyond the court's narrow decision to simply strike any reference to closures for litigation strategy.

I support this because it will avoid what could be costly litigation. The Supreme Court's decision in the AP case neatly destroyed just about any arguments that could be used in defense of closing meetings to discuss any type of litigation strategy. It was a brief, 10-page decision, and with the chairman's permission I will leave it with the committee secretary.

Sincerely,

JWK

Enclosure

P.O. Box 5810, Helena, Montana 59604 406 442-7440

No. 89-589

IN THE SUPREME COURT OF THE STATE OF MONTANA

1990

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 3
DATE 2-9-93
BILL NO. SB250

THE ASSOCIATED PRESS, BILLINGS GAZETTE, HELENA INDEPENDENT RECORD, MISSOULA MISSOULIAN, GREAT FALLS TRIBUNE, KALISPELL DAILY INTERLAKE, BOZEMAN DAILY CHRONICLE, HAVRE DAILY NEWS, LIVINGSTON ENTERPRISE, MILES CITY STAR, BUTTE MONTANA STANDARD, HAMILTON RAVALLI REPUBLIC, MONTANA NEWSPAPER ASSOCIATION, MONTANA CHAPTER OF THE SOCIETY OF PROFESSIONAL JOURNALISTS,
Plaintiffs and Respondents,

-v-

THE BOARD OF PUBLIC EDUCATION,
Defendant and Appellant.

APPEAL FROM: District Court of the First Judicial District, In and for the County of Lewis and Clark, The Honorable Jeffrey Sherlock, Judge presiding.

COUNSEL OF RECORD:

For Appellant:
Betsy Brandborg & Kim Kradolfer; Agency Legal Services Bureau; Helena, Montana
For Respondents:
James P. Reynolds; Reynolds, Molt & Sherwood; Helena, Montana
Peter Michael Meloy; Meloy Law Firm; Helena, Montana
Amicus:
Bruce Moerer; Montana School Boards Assoc; Helena, Montana
Stephen F. Garrison; Dept. of Highways, Helena, Montana
Dal Smilie; Dept. of Admin.; Helena, Montana
Martin Jacobsen; Public Service Com.; Helena, Montana
Timothy J. Meloy; Dept. of Agriculture; Helena, Montana
David J. Patterson, Montana Assoc. of Counties; Missoula, Montana
Annie M. Bartos; Dept. of Commerce; Helena, Montana
James R. Beck; Dept. of Highways; Helena, Montana
David A. Scott; Dept. of Labor & Industry; Helena, Montana
John F. North; Dept. of State Lands; Helena, Montana
Donald D. MacIntyre; Dept. of Natural Resources and Conservation; Helena, Montana
Brad Belke, Butte, Montana (for common cause)
G. Steven Brown; Helena, Montana (for Mt. School Boards Association)
John P. Poston; Helena, Montana (for Reporters Committee for Freedom of the Press)
Jeffrey T. Renz; American Civil Liberties Union of Montana; Billings, Montana
Jim Madden; Reserved Water Rights Compact Comm.; Helena, Montana

Submitted: November 27, 1990
Decided: January 4, 1991

Filed:

Clerk

Justice R. C. McDonough delivered the Opinion of the Court.0

Defendant, the Board of Public Education, appeals from an order granting summary judgment in favor of plaintiffs, the Associated Press and its member organizations. The District Court of the First Judicial District, Lewis and Clark County, held that the litigation exception contained in § 2-3-203(4), MCA, which allows public agencies to close meetings when discussing litigation strategy, is unconstitutional because it violates Article II, Section 9 of the Montana Constitution. We affirm.

We frame the issues as follows:

1. Whether the Board of Public Education can, under the authority of § 2-3-203(4), MCA, validly close a meeting and exclude members of the public, in order to hold a private discussion concerning litigation strategy in a lawsuit to be asserted against the Governor;

2. Whether the District Court erred in awarding attorney fees to plaintiffs, Associated Press, et al.

Because the District Court decided this case on cross motions for summary judgment, the facts are not in controversy.

The Board of Public Education (Board) is created by Article X, Section 9(3) of the Montana Constitution. Its primary purpose is to exercise general supervision over the public school system and other public educational institutions. The plaintiffs in this case, include the Associated Press and its member news organizations, the Montana Newspaper Association and the Montana Chapter of the Society of Professional Journalists. On February

8, 1989, the Board convened a meeting to consider a court challenge to an Executive Order, which required that the Board's administrative rules be submitted to the Governor for review and approval. The meeting took place in Claudette Morton's office, who is the Board's executive secretary. Attending in person were Morton, Board Chairperson Alan Nicholson, Morton's administrative assistant Patricia Admire and attorney W. William Leaphart. Six other Board members participated by speaker phone. Associated Press reporter Faith Conroy and Marilyn Miller, an employee of the Governor's Office of Budget and Program Planning were also present in Morton's office.

Following roll call, the Board voted to close the meeting to discuss strategy to be followed with respect to potential litigation regarding the Governor's order. As a result of this vote, Faith Conroy was required, over her protest, to leave the room while this discussion took place. Marilyn Miller and Patricia Admire were also excluded from the closed portion of the meeting. The meeting was closed for approximately one-half hour.

When the meeting was reopened Conroy, Miller and Admire were allowed to reenter the room. At this point, the Board unanimously passed a motion calling for a court challenge to the Governor's order.

The next day the plaintiffs filed a complaint in District Court alleging that the Board met by telephone conference call and had closed its meeting to discuss litigation strategy. They maintained that the Montana Constitution does not authorize any

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public body or agency to close its meetings, even when the meeting is called for the sole purpose of discussing litigation strategy. They therefore asked the District Court to declare § 2-3-203(4), MCA, unconstitutionally over broad and in conflict with Article II, Section 9 of the Montana Constitution. They further requested that the actions taken in the meeting be declared void and for it to award them attorney fees and costs.

The parties stipulated to a statement of facts for purposes of cross motions for summary judgment. The matter was briefed and argued, and on August 4, 1989 the District Court entered summary judgment in favor of the plaintiffs, declaring § 2-3-203(4), MCA, unconstitutional. This appeal followed.

I

We hold that the issue presented by this case is narrow. Simply put, this case requires us to determine whether the citizens of the State of Montana have an absolute constitutional right to attend and observe a meeting held by a public body or state agency which is held to discuss litigation strategy to be used in potential litigation against another state governmental entity. The two legal provisions which are pertinent to our decision are:

Article II, Section 9 of the Montana Constitution which states:

> Section 9. Right to know. No person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies of state government and its subdivisions, except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure.

and § 2-3-203, MCA, which states in pertinent part:

> 2-3-203. Meetings of public agencies and certain associates of public agencies to be open to public--exceptions. (1) all meetings of public or governmental bodies, boards, bureaus, commissions, agencies of the state, or any political subdivision of the state or organizations or agencies supported in whole or in part by public funds or expending public funds must be open to the public.
>
> * * *
>
> (4) However, a meeting may be closed to discuss a strategy to be followed with respect to collective bargaining or litigation when an open meeting would have a detrimental effect on the bargaining or litigating position of the public agency.

The Associated Press maintains that Article II, Section 9 is clear on its face. Its wording succinctly mandates that all meetings of public bodies and state agencies must be open to the public unless "the demand of individual privacy clearly exceeds the merits of public disclosure." Therefore, the Associated Press argues § 2-3-203(4), MCA, which purportedly allows a public agency to privately discuss litigation strategy, is violative of this constitutional mandate and must be struck down as unconstitutional.

The Board, on the other hand, argues that this Court should balance other constitutional principles against the public's right to know. It maintains that the public, who is the true party in interest, has a right to due process which exceeds its right to know. The Board further argues that inherent in the right to due process is the right to confidentially confer with counsel. If state government is forced to open its meetings and publicly discuss litigation strategy, the right to speak to its attorneys in confidence will necessarily be lost. If this right is lost, state agencies, and consequently the public, will no longer retain

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their right to due process.

The premise underlying the Board's argument is unsound. State agencies have never been included under the umbrella of the right to due process. The protections guaranteed by the constitutional right to due process were designed to protect people from governmental abuses. They were not designed to protect the government from the people. See State v. Katzenbach (1966), 383 U.S. 301, 86 S.Ct. 803, 15 L.Ed.2d 769. This Court has generally followed this line of reasoning and has held that due process does not embrace the state or its political subdivisions. See Fitzpatrick v. State Board of Examiners (1937), 105 Mont. 234, 70 P.2d 285. Because the Board's underlying premise fails, its argument based upon due process also fails.

As further rationale, the Board argues that under Article VII, Section 2(3), this Court retains sole constitutional authority to make rules governing the conduct of members of the bar. Under this grant of authority, this Court has adopted rule 1.6 of the Rules of Professional Conduct which provides:

> A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation. . .

Taking this argument further, the Board correctly maintains that this rule applies to all attorneys, including those employed by state agencies. Therefore, the argument goes, Rule 1.6 prevents them from discussing matters in public with their public agency clients.

This argument fails for at least two reasons. First and

foremost, is the realization that the Constitution is the supreme law of this State. Its mandate must be followed by each of the three branches of government. Therefore, while this Court is authorized to adopt rules governing the practice of law, it may not enact any rule which violates express guarantees contained in the Constitution. The interpretation of such rules is limited by the confines of the Constitution.

Second, we note that while an attorney must protect the confidences of his client, he is also directed to act within the law. As such this provision supersedes Rule 1.6, relative to public boards or agencies.

Next, the Board argues that both the constitutional history of Article II, Section 9 and applicable law from other states provide compelling reasoning which mandates reversal of the District Court's order. However, we have noted that this provision is unique, clear and unequivocal. Therefore as in the past we refuse to resort to law from other forums in interpreting our own Constitution. See e.g. Yellowstone Pipeline Co. v. State Board of Equalization (1960), 138 Mont. 603, 358 P.2d 55.

The language of Article II, Section 9 is clear as applied to this case. We are precluded, by general principles of constitutional construction, from resorting to extrinsic methods of interpretation. As we stated in a prior case:

> The language of [Article II, Section 9] speaks for itself. It applies to all persons and all public bodies of the state and its subdivisions without exception. Under such circumstances, it is our duty to interpret the intent of the framers from the language of the provision alone and not to resort to extrinsic aids or rules of

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> construction in determining the intent of the delegates to the Constitutional Convention.

Great Falls Tribune v. District Court (1980), 186 Mont. 433, 437-38, 608 P.2d 116, 119.

Applying the language of the provision to the agreed facts of this case we conclude that the Board wrongfully closed its meeting, which was held to discuss potential litigation between two governmental entities, in violation of the State Constitution.

The Board argues however, that public policy considerations mandate closure of meetings convened for the sole purpose of discussing litigation strategy. It maintains that if the State is required to open its meetings it will be severely disadvantaged in litigation against private parties because it will be forced to reveal all strategy to the opposing party. The opposition on the other hand will not be under such constraints and therefore litigation involving the State will not be played on a level field.

However, this argument really doesn't apply to the facts of this case. The potential litigation in this case involved a dispute over rule making authority between the Governor and the Board of Public Education. The Board's reasoning for filing the lawsuit may have been well taken. However, this fact does not overcome the realization that the dispute between the Board and the Governor was essentially a turf battle which should be given public scrutiny in all its particulars. In short, it is the public's business.

II

Having upheld the District Court's order voiding the Board's

actions, we must now determine whether it correctly awarded plaintiffs their attorney fees. The Board maintains the award of attorney fees was inappropriate in this case, because the Board acted in good faith and under the presumption that their actions were constitutional under § 2-3-203(4), MCA.

The District Court awarded fees under § 2-3-221, MCA, which states:

> A plaintiff who prevails in an action brought in district court to enforce his rights under Article II, section 9, of the Montana constitution may be awarded his costs and reasonable attorney fees.

The award of attorney fees in cases brought under Article II, Section 9 are discretionary with the court The Board argues that the court incorrectly exercised this discretion because the action was not taken frivolously or in bad faith.

We disagree. By awarding plaintiffs their fees, the District Court obviously recognized the import of its decision and spread the cost of the litigation among its beneficiaries. Due to the particular advantages of enforcement of the right in this case, as well as the resultant public benefits gained by plaintiffs' efforts it was not an abuse of discretion to reimburse them from the public coffers. That is the intent of the statute.

The award of attorney fees is affirmed and pursuant to the plaintiffs' request fees incurred on appeal are also granted and this case is remanded for determination of attorney fees.

R.C. McDonough
Justice

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DATE 2-9-93
SB 250

We Concur:

J. A. Turnage
Chief Justice

John L. Sterling

Jane Y. Barr

William E. Hunter

John Conway Harrison

Justices

AMENDMENTS TO SENATE BILL 250
FIRST READING COPY
PREPARED BY THE DEPARTMENT OF JUSTICE

1. Page 1, line 8
Following: "REMOVING"
Strike: "CERTAIN EXCEPTIONS"
Insert: "THE EXCEPTION FOR COLLECTIVE BARGAINING STRATEGY MEETINGS"

2. Page 1, line 15
Following: "~~exceptions~~"
Strike: "exception"
Insert: "EXCEPTIONS"

3. Page 2, line 12
Following: "~~agency.~~"
Insert: HOWEVER, A MEETING MAY BE CLOSED TO DISCUSS A STRATEGY TO BE FOLLOWED WITH RESPECT TO LITIGATION WHEN AN OPEN MEETING WOULD HAVE A DETRIMENTAL EFFECT ON THE LITIGATING POSITION OF THE PUBLIC AGENCY.

4. Page 2, line 13
Strike: "~~(5)~~"
Insert: "(5)"

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 4
DATE 2-9-93
BILL NO. SB250

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 5
DATE 2-9-93
BILL NO. SB250

February 9, 1993

Support S.B. 250 w. Amendments

SENATE JUDICIARY COMMITTEE:

For the record, I'm Brett Dahl, Administrator of the Risk Management and Tort Defense Division.

We support S.B. 250 with the amendments proposed by Mr. Tweeten (specifically, page 2, line 12, Insert:)

> HOWEVER, A MEETING MAY BE CLOSED TO DISCUSS A STRATEGY TO BE FOLLOWED WITH RESPECT TO LITIGATION WHEN AN OPEN MEETING WOULD HAVE A DETRIMENTAL EFFECT ON THE LITIGATING POSITION OF THE PUBLIC AGENCY.

The Risk Management and Tort Defense Division provides a defense for state agencies in legal actions involving tort allegations. Meetings are often held with agency personnel and legal counsel and involve discussions of legal strategy. These discussions are often sensitive and require the same confidentiality that would be given anyone in an attorney client relationship.

To open these meetings to the public, including opposing plaintiffs and plaintiff's attorneys would seriously comprimise the state's ability to provide a vigorous and effective defense. All we ask for is a 'level playing field'.

We recommend a do pass vote with amendments. THANK YOU

DATE 2-9-93

SENATE COMMITTEE ON Judiciary

BILLS BEING HEARD TODAY: S.B 249 (Vollentine), 250 "
S.B 259 Harp

Name	Representing	Bill No.	Check One: Support	Check One: Oppose
[illegible]	Mt. Helena Chamber	SB250	✓	
Britt Hall	Dept. of Admin.	SB250	✓ w. amendment	
Ivan Evilsizer	PSC	249, 250, 259		
David Ditzel	Bro. of Locomotive Engrs	SB249	✓	
[illegible]	U.T.U		✓	
AMY KELLEY	COMMON CAUSE	SB 250	✓	
Chris Tweeten	Attorney General	SB250	as amended ✓	
James T. MULAR	MYSELF	SB 249	✓	
[illegible]	DHES	SB 250	neutral	
[illegible]	THE AP	SB250	✓	

VISITOR REGISTER

PLEASE LEAVE PREPARED STATEMENT WITH COMMITTEE SECRETARY

F10

MINUTES

MONTANA SENATE
53rd LEGISLATURE - REGULAR SESSION

COMMITTEE ON JUDICIARY

Call to Order: By Senator Bill Yellowtail, on February 16, 1993, at 10:05 a.m.

ROLL CALL

Members Present:

Sen. Bill Yellowtail, Chair (D)
Sen. Steve Doherty, Vice Chair (D)
Sen. Sue Bartlett (D)
Sen. Chet Blaylock (D)
Sen. Bob Brown (R)
Sen. Bruce Crippen (R)
Sen. Eve Franklin (D)
Sen. Lorents Grosfield (R)
Sen. Mike Halligan (D)
Sen. John Harp (R)
Sen. David Rye (R)

Members Excused: Sen. Towe

Members Absent: NONE

Staff Present: Valencia Lane, Legislative Council
Rebecca Court, Committee Secretary

Please Note: These are summary minutes. Testimony and discussion are paraphrased and condensed.

Committee Business Summary:

Hearing:	SB 4
	SB 5
	SB 242
Executive Action:	SB 23
	SB 41
	SB 119
	SB 210
	SB 217
	SB 250
	SB 260
	SB 356
	SB 321

HEARING ON SB 4

Opening Statement by Sponsor:

Vote:
The motion to Table SB 356 CARRIED with Senator Doherty voting NO.

EXECUTIVE ACTION ON SB 250

Motion:
Senator Bartlett moved to amend SB 250. (Exhibit #5)

Discussion:
Chair Yellowtail explained the amendments.

Vote:
The motion to amend SB 250 CARRIED with Senator Rye voting NO.

Motion:
Senator Brown moved SB 250 DO PASS AS AMENDED. The motion CARRIED UNANIMOUSLY.

EXECUTIVE ACTION ON SB 321

Motion/Vote:
Senator Halligan moved SB 321 DO PASS. The motion CARRIED with Senators Doherty and Franklin voting NO.

ADJOURNMENT

Adjournment: 12:00 p.m.

Wm Yellowtail
BILL YELLOWTAIL, Chair

Rebecca Court
REBECCA COURT, Secretary

BY/rc

Amendments to Senate Bill No. 250
First Reading Copy

Requested by Dept. of Justice
For the Committee on Judiciary

Prepared by Valencia Lane
February 10, 1993

1. Title, line 8.
Following: "REMOVING"
Strike: "CERTAIN EXCEPTIONS"
Insert: "THE EXCEPTION FOR COLLECTIVE BARGAINING STRATEGY MEETINGS"

2. Page 1, line 15.
Strike: "exception"
Insert: "exceptions"

3. Page 2, line 12.
Following: "~~agency.~~"
Insert: "(a) However, except as provided in subsection (4) (b), a meeting may be closed to discuss a strategy to be followed with respect to litigation when an open meeting would have a detrimental effect on the litigating position of the public agency.

(b) A meeting may not be closed to discuss strategy to be followed in litigation in which the only parties are public bodies or associations described in subsections (1) and (2)."

4. Page 2, line 13.
Following: "~~(5)~~"
Insert: "(5)"

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 5
DATE 2-16-93
BILL NO. SB250

SENATE STANDING COMMITTEE REPORT

February 16, 1993

MR. PRESIDENT:
We, your committee on Judiciary having had under consideration Senate Bill No. 250 (first reading copy -- white), respectfully report that Senate Bill No. 250 be amended as follows and as so amended do pass.

Signed: Wm Yellowtail
Senator William "Bill" Yellowtail, Chair

That such amendments read:

1. Title, line 8.
Following: "REMOVING"
Strike: "CERTAIN EXCEPTIONS"
Insert: "THE EXCEPTION FOR COLLECTIVE BARGAINING STRATEGY MEETINGS"

2. Page 1, line 15.
Strike: "exception"
Insert: "exceptions"

3. Page 2, line 12.
Following: "~~agency.~~"
Insert: "(a) However, except as provided in subsection (4) (b), a meeting may be closed to discuss a strategy to be followed with respect to litigation when an open meeting would have a detrimental effect on the litigating position of the public agency.

(b) A meeting may not be closed to discuss strategy to be followed in litigation in which the only parties are public bodies or associations described in subsections (1) and (2)."

4. Page 2, line 13.
Following: "~~(5)~~"
Insert: "(5)"

-END-

M — Amd. Coord.
Sec. of Senate

MINUTES

MONTANA HOUSE OF REPRESENTATIVES
53rd LEGISLATURE - REGULAR SESSION

COMMITTEE ON EDUCATION & CULTURAL RESOURCES

Call to Order: By Rep. H.S. "Sonny" Hanson, Chair, on March 3, 1993, at 3:00 p.m.

ROLL CALL

Members Present:

Rep. Sonny Hanson, Chair (R)
Rep. Alvin Ellis, Vice Chair (R)
Rep. Ray Brandewie (R)
Rep. Fritz Daily (D)
Rep. Ervin Davis (D)
Rep. Ed Dolezal (D)
Rep. Dan Harrington (D)
Rep. Jack Herron (R)
Rep. Bob Gervais (D)
Rep. Bea McCarthy (D)
Rep. Scott McCulloch (D)
Rep. Norm Mills (R)
Rep. Bill Rehbein (R)
Rep. Sam Rose (R)
Rep. Dick Simpkins (R)
Rep. Wilbur Spring (R)
Rep. Norm Wallin (R)
Rep. Diana Wyatt, Vice Chair (D)

Members Excused: None

Members Absent: None

Staff Present: Andrea Merrill, Legislative Council
Susan Lenard, Committee Secretary

Please Note: These are summary minutes. Testimony and discussion are paraphrased and condensed.

Committee Business Summary:

Hearing: SB 178, SB 211, SB 250, HB 540
Executive Action: SB 75, SB 178, SB 250

HEARING ON HB 540

Opening Statement by Sponsor:

REP. BACHINI, House District 14, Havre, introduced HB 540 by indicating it would establish a higher education deferred

HEARING ON SB 250

Opening Statement by Sponsor:

SENATOR YELLOWTAIL, Senate District 50, Wyola, explained the bill arises from the responsibilities of the co-commissioner of the Legislative Council, Mr. Greg Petesch. The Montana codes need to conform to recent actions of the state supreme court which have brought about substantive changes. The senator noted the supreme court has specifically changed the impact of the open meetings law.

Proponents' Testimony:

Greg Petesch, Co-Commissioner of the Legislative Council, said the bill is piece of legislation which is presented to the legislature each session. The provisions contained in HB 540 are not included in the co-commissioner's bill because they are substantive in nature and do involve some policy choices. **Mr. Petesch** explained the two recent court decisions struck down the bargaining exception to the open meetings law. In a very narrow opinion the court also struck down the litigation exception to the open meeting law, but it was lifted on the specific grounds that both parties are to be public entities. He said several attorneys for the state were concerned about removing the litigation exception in entirety. (It was noted there is some basis to the argument considering attorney/client privilege.) He noted they were also concerned with possible disclosure of documents related to litigation. The Senate Judiciary Committee carefully crafted the amendment to limit the litigation exception to the expressed concerns of the supreme court decision. The purpose of HB 250 is to allow a party reading the code to know the state of the law at that point in time.

Chris Tweeten, Chief Deputy Attorney General for the State of Montana, Department of Justice, stood in support of the bill with the Senate amendments in place. He said the attorney/client privilege and the word product privileges that exist with respect to other attorneys representing their clients should be available to state government as well.

Charles Watt, Executive Director of the Montana Newspaper Association, expressed his organization's support of SB 250 in keeping with the concepts of open government and the people's right to know. He observed SB 250 will alleviate or even eliminate further expensive and unnecessary court challenges in the areas of collective bargaining and litigation as approached in this section of the code and recently addressed by the Montana supreme court.

Katherine Aura, Chief Legal Council for the Montana State Department of Health, stood in support of HB 540 as amended.

Opponents' Testimony: None.

Questions From Committee Members and Responses:

REP. HANSON asked the sponsor if unions are considered public agencies, as far as the particular agency for which they bargain was concerned. **SEN. YELLOWTAIL** said he believed they would not be open, but deferred the question to **Mr. Petesch. Mr. Petesch** replied that unions are not public agencies within the meaning of the open meetings law and thus can meet privately.

Closing by Sponsor:

SEN. YELLOWTAIL said the court decision seems to have created a "tipped playing field" in collective bargaining situations. He noted the remedy might be a constitutional problem, but said SB 250 does not attempt to address that issue. **SEN. YELLOWTAIL** stressed the Montana codes need to be made readable in the actual state of the law. He said the intent of SB 250 was to succeed in making the codes more comprehensible.

HEARING ON SB 211

Opening Statement by Sponsor:

SENATOR YELLOWTAIL, Senate District 50, Wyola, introduced SB 211 as a bill which would give flexibility to local school districts. It would provide them with the opportunity to be granted variance to the school year for 180 days of instruction. The bill would permit the Board of Public Education to accept petitions from local school districts which would propose to meet fewer days than 180 days and to establish a longer school day. The total amount of instruction time would remain the same. Accreditation standards set by the Board of Public Education would also be upheld. He noted this arises from the experience his district has had with a Wyoming bordering district. **SEN. YELLOWTAIL** noted the Wyoming district in question operates on a four day school week and the Wyoming law needed to be changed to allow for this variation. The primary purpose is to allow a district to adjust its schedule so activities such as extra-curricular activities can be concentrated on one day. He noted this could alleviate the number of interruptions which occur in the course of the present school day. **SEN. YELLOWTAIL** suggested a school district, particularly a rural district with considerable travel costs, might find it cost effective to have a four day school week for all or part of the year. It was articulated that SB 211 does not require any particular scheme, but allows the local school district to devise a plan that best fits its interests. The school district would apply to the Board of Public Education for a variance. The Board of Public Education must be convinced that all other criteria are satisfied. He said the non-traditional school week in the Wyoming district not only resulted in some desirable advantages for the school but was also very well received by the community. A letter from the superintendent and

REP. SIMPKINS asked the sponsor if he had the support of most school districts in the Senate hearing. **SEN. BROWN** replied the only difficulty to occur in the hearing was with regards to the section just mentioned, and so it was amended.

Closing by Sponsor: **SEN. BROWN** closed the hearing on SB 178.

EXECUTIVE ACTION ON SB 178

Motion/Vote: **REP. BRANDEWIE MOVED SB 178 BE CONCURRED IN.** Motion carried 17 to 1 with **REP. SPRING** voting no.

EXECUTIVE ACTION ON SB 250

Motion/Vote: **REP. GERVAIS MOVED SB 250 DO PASS.** Motion carried 15 to 3 with **REPS. ELLIS, REHBEIN,** and **SPRING** voting no.

EXECUTIVE ACTION ON SB 75

Motion: **REP. MCCULLOCH MOVED SB 75 DO PASS.**

Discussion:

REP. SIMPKINS asked if SB 75 would pull money out of the general fund. **Ms. Merrill** said initially thirty percent of the liability amount could be transferred into this compensated absence liability fund. She noted the last Legislature had decided to end the practice of transferring money into this fund, but SB 75 would extend it.

REP. MILLS asked how much sick leave time an individual may accrue. **Ms. Merrill** stated the bill covers only non-certified individuals in schools. These individuals must comply with state law which allows for the payment of one fourth of an individual's accumulated sick leave.

REP. SIMPKINS asked for the purpose of the bill if schools have adequate reserves. **Ms. Merrill** replied the whole concept of the bill is to allow the continuance of money transferral into the compensated absence liability fund. Present statutes permitting the transfer will sunset without the passage of SB 178.

Motion: **REP. REHBEIN MADE A SUBSTITUTE MOTION THAT SB 178 DO NOT PASS.**

Motion: **REP. BRANDEWIE MOVED SB 178 BE TABLED.** Motion carried 11 to 7 with **REPS. DAILY, DAVIS, DOLEZAL, HARRINGTON, GERVAIS, MCCARTHY,** and **MCCULLOCH** voting no. **EXHIBIT 6**

HOUSE STANDING COMMITTEE REPORT

March 4, 1993

Mr. Speaker: We, the committee on Education and Cultural Resources report that Senate Bill 250 (third reading copy -- blue) be concurred in .

Signed: H S "Sonny" Hanson
Sonny Hanson, Chair

Carried by: Rep. McCulloch

Committee Vote:
Yes ___, No ___.

490942SC.Hss

SENATE BILL NO. 250

INTRODUCED BY YELLOWTAIL

BY REQUEST OF THE SENATE JUDICIARY COMMITTEE

A BILL FOR AN ACT ENTITLED: "AN ACT CONFORMING THE OPEN MEETING LAW TO THE INTERPRETATION OF THE PUBLIC PARTICIPATION AND RIGHT TO KNOW PROVISIONS OF THE MONTANA CONSTITUTION BY REMOVING ~~CERTAIN EXCEPTIONS~~ THE EXCEPTION FOR COLLECTIVE BARGAINING STRATEGY MEETINGS; AND AMENDING SECTION 2-3-203, MCA."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 2-3-203, MCA, is amended to read:

"2-3-203. Meetings of public agencies and certain associations of public agencies to be open to public -- exceptions ~~exception~~ EXCEPTIONS. (1) All meetings of public or governmental bodies, boards, bureaus, commissions, agencies of the state, or any political subdivision of the state or organizations or agencies supported in whole or in part by public funds or expending public funds must be open to the public.

(2) All meetings of associations that are composed of public or governmental bodies referred to in subsection (1) and that regulate the rights, duties, or privileges of any individual must be open to the public.

(3) Provided, however, the presiding officer of any meeting may close the meeting during the time the discussion relates to a matter of individual privacy and then if and only if the presiding officer determines that the demands of individual privacy clearly exceed the merits of public disclosure. The right of individual privacy may be waived by the individual about whom the discussion pertains and, in that event, the meeting ~~shall~~ must be open.

(4) ~~However, a meeting may be closed to discuss a strategy to be followed with respect to collective bargaining or litigation when an open meeting would have a detrimental effect on the bargaining or litigating position of the public agency.~~ (A) HOWEVER, EXCEPT AS PROVIDED IN SUBSECTION (4)(B), A MEETING MAY BE CLOSED TO DISCUSS A STRATEGY TO BE FOLLOWED WITH RESPECT TO LITIGATION WHEN AN OPEN MEETING WOULD HAVE A DETRIMENTAL EFFECT ON THE LITIGATING POSITION OF THE PUBLIC AGENCY.

(B) A MEETING MAY NOT BE CLOSED TO DISCUSS STRATEGY TO BE FOLLOWED IN LITIGATION IN WHICH THE ONLY PARTIES ARE PUBLIC BODIES OR ASSOCIATIONS DESCRIBED IN SUBSECTIONS (1) AND (2).

~~(5)~~(5) Any committee or subcommittee appointed by a public body or an association described in subsection (2) for the purpose of conducting business which is within the jurisdiction of that agency ~~shall be~~ is subject to the

REFERENCE BILL

requirements of this section."

-End-